# Sykt Pengangkutan Sakti Sdn Bhd v Tan Joo Khing t/a Bengkel Sen Tak

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-92 OF 1997
ABDUL MALIK ISHAK J
19 JUNE 1997

***Legal Profession*** *— Counsel acting as witness — Retained solicitor needed as a witness by the opposite party — Whether it is desirable for a solicitor to appear as a counsel in a trial when he is required to be a witness in the same trial on a material question of fact — Whether it was permissible for legal assistant of a firm to replace another colleague who will become a witness for the opposite party — Whether law firm should remain on record as solicitors when one of its lawyers was required as a witness — Whether court has inherent power to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case — Whether the right of a particular individual to be represented by an advocate and solicitor of his own choice is absolute — Legal Profession Act 1976 s 94(3)(n) & (o) — Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 4, 5, 27, 28(a) & 29*

The plaintiff engaged an advocate and solicitor, Mr Gana Muthusamy ('Mr Muthusamy'), for the purpose of getting back his motor van from the defendant's workshop when the latter had refused to return unless the plaintiff settled a sum of RM1,267. On the basis of that retainer, Mr Muthusamy proceeded to the defendant's workshop accompanied by a representative from the plaintiff's company. At the defendant's workshop, Mr Muthusamy spoke to one Tan Joo Khing and tried to persuade him to release the motor van with an undertaking by the plaintiff to settle all the charges payable to the workshop but without prejudice to the right of the plaintiff to litigate the matter in a court of law. However, the attempt by learned counsel failed. Subsequently, the law firm of Messrs Gana Muthusamy & Co served on the defendant a writ of summons indorsed with a statement of claim and a summons in chambers with two affidavits. At the hearing of the summons in chambers, counsel for the defendant raised a preliminary objection to the effect that the law firm of Messrs Gana Muthusamy & Co should not appear on record as solicitors for the plaintiff since Mr Muthusamy would be called as a witness. Further, she also submitted that not only Mr Muthusamy ought not to appear for the plaintiff but the law firm as a whole, including the legal assistants, should not appear or act for the plaintiff, be it in chambers or in open court.

**Held**, allowing the preliminary objection and ordering the plaintiff to engage a new counsel:

(1) To allow the plaintiff's counsel or his legal assistant to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of clear words in s 94(3)(n) and (o) of the Legal Profession Act 1976. As advocates and solicitors, they should have due regard to their client's interests and must conduct themselves with decorum so as not to

bring the legal profession into disrepute. The law firm of Messrs Gana Muthusamy & Co would equally be infected and should not remain on record as solicitors for the plaintiff for the simple reason that Mr Muthusamy owned the firm (see p 724G–H).

(2) When Mr Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing, he became a witness on material and disputed questions of fact. By virtue of r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr Muthusamy should be barred from representing the plaintiff, be it in open court or in chambers, as he should not be allowed to be a witness for the defendant and counsel for the plaintiff at the same time.

The rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this august profession. The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right (see p 725D–F); *R v Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] KB D 546 followed.

(3) The position would also be the same if another legal assistant from the same firm is allowed to represent the case whether it is in chambers or in open court. To say that Mr Muthusamy would not be involved in the case at all is wrong. No doubt he would not appear in chambers and in open court for the case but indirectly he would be involved. He cannot conduct with decorum and avoid a conflict of interest situation if his legal assistant is allowed to represent the plaintiff in the present case, be it in chambers or in open court, since he owned the law firm and that law firm should not appear on record as solicitors (see p 726C–E).

**[Bahasa Malaysia summary**

Plaintif telah melantik seorang peguambela dan peguamcara, En Gana Muthusamy ('En Muthusamy') untuk mendapatkan semula motor van kepunyaannya dari bengkel defendan apabila defendan enggan memulangkannya semula kepada plaintif selagi jumlah sebanyak RM1,267 tidak dijelaskan oleh plaintif. Berdasarkan retainer tersebut En Muthusamy telah pergi ke bengkel defendan bersama-sama dengan wakil daripada syarikat plaintif. Di bengkel defendan, En Muthusamy telah bercakap dengan seorang bernama Tan Joo Khing dan cuba meyakinkannya untuk menyerahkan motorvan dengan satu akujanji daripada plaintif untuk menjelaskan semua bayaran yang perlu dijelaskan kepada bengkel tersebut tetapi tanpa menjejaskan hak plaintif untuk mempertikaikan perkara tersebut di mahkamah. Usaha tersebut tidak berhasil. Selepas itu Tetuan Gana Muthusamy & Co

telah menyampaikan writ saman yang diendorskan dengan penyata tuntutan dan satu saman dalam kamar bersama dua afidavit kepada defendan. Di pembicaraan saman dalam kamar, peguam defendan telah membangkitkan satu bantahan permulaan bahawa Tetuan Gana Muthusamy & Co tidak boleh bertindak sebagai peguamcara plaintif kerana En Muthusamy akan dipanggil sebagai saksi. Tambahan lagi, beliau juga berhujah bahawa bukan sahaja En Muthusamy tidak boleh mewakili plaintif malah seluruh firma guaman, termasuk pembantu guaman, tidak patut hadir atau bertindak bagi pihak plaintif, sama ada dalam kamar atau di mahkamah terbuka.

**Diputuskan,** membenarkan bantahan awal dan mengarahkan plaintif melantik peguam baru:

(1) Dengan membenarkan peguam plaintif atau pembantu peguamnya hadir dalam kamar atau di mahkamah terbuka sedangkan peguam plaintif akan menjadi seorang saksi di dalam kes tersebut akan bercanggahan dengan perkataan-perkataan yang jelas dalam s 94 (3)(n) dan (o) Akta Profesyen Undang-Undang 1976. Sebagai peguambela dan peguamcara mereka patut mengambil berat kepentingan anak guam dan haruslah berkelakuan dengan tertib agar nama baik profesyen guaman tidak tercemar. Firma undang-undang Tetuan Gana Muthusamy & Co juga tidak boleh kekal atas rekod sebagai peguamcara bagi pihak plaintif disebabkan firma tersebut dimiliki oleh En Muthusamy (lihat ms 724G–H).

(2) Apabila En Muthusamy melawat bengkel defendan dan bercakap dengan Tan Joo Khing, beliau telah menjadi seorang saksi terhadap isu dan fakta material yang dipertikaikan. Menurut k 28(a) Kaedah Profesyen Guaman (Amalan dan Etika) 1978, En Muthusamy sepatutnya dihalang daripada mewakili plaintif, sama ada dalam kamar atau di mahkamah terbuka, kerana beliau tidak patut dibenarkan menjadi saksi bagi pihak defendan dan peguam bagi pihak plaintif serentak.

Kaedah-kaedah tersebut mestilah dipatuhi agar pengendalian litigasi adalah teratur dan untuk mengekalkan serta mematuhi taraf kelakuan yang dikehendaki daripada ahli-ahli profesyen yang mulia ini. Mahkamah-mahkamah mempunyai kuasa sedia ada dan autoriti untuk menolak kebenaran untuk seseorang peguambela dan peguamcara mewakili individu tertentu dalam suatu kes tertentu. Bersemuka dengan sanksi ini, ia akan merupakan salah laku melampau pada pihak peguambela dan peguamcara berkenaan yang mewakili. Hak seseorang individu tertentu untuk diwakili oleh peguambela dan peguamcara yang dipilihnya sendiri adalah tidak mutlak. Mahkamah akan menentukan hak itu (lihat ms 725D–F); *R v Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] KB D 546 diikut.

(3) Kedudukannya adalah sama sekiranya seorang pembantu peguam dari firma yang sama dibenarkan mewakili kes tersebut sama ada

di dalam kamar atau di mahkamah terbuka. Adalah salah untuk menyatakan bahawa En Muthusamy tidak terlibat sama sekali dalam kes ini. Sungguhpun beliau tidak akan hadir di kamar atau di mahkamah terbuka, secara tidak langsung beliau adalah terlibat. Beliau tidak dapat mengendalikan kes dengan ketertiban dan mengelak daripada percanggahan kepentingan sekiranya pembantu peguamnya dibenarkan mewakili plaintif dalam kes ini sama ada dalam kamar atau di mahkamah terbuka memandangkan beliau adalah pemilik firma undang-undang dan firma tersebut tidak boleh direkodkan sebagai peguamcara (lihat ms 726C–E).]

**Notes**

For a case on counsel acting as witness, see 9 *Mallal' Digest* (4th Ed, 1995 Reissue) para 1424.

**Cases referred to**

*Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors* [1966] 4 MLJ 54 (refd)
*Abdul Kadir bin Abdul Rahman v PP* [1984] 1 MLJ 80 (refd)
*Adams v London Improved Motor Coach Builders Ltd* [1921] 1 KB 495 (refd)
*Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33 (refd)
*Beer v Ward* (1821) Jac 77 (refd)
*Bolden v Nicholay* (1857) 3 Jur NS 884 (refd)
*Bricheno v Thorp* (1821) Jac 300 (refd)
*Brown v Raphael* [1958] Ch 636 (refd)
*Burford, Re; Burford v Clifford* [1932] 2 Ch 122 (refd)
*Cairns v Cairns* (1931) 3 WWR 335 (refd)
*Cheak Yoke Thong v PP* [1984] 2 MLJ 119 (refd)
*Comden v Superior Court*, 20 Cal 3d 906, 912, 576 P 2D 971, 973, 145 Cal Rptr 9, 11, cert denied, 439 US 981 (1978) (refd)
*Crossley v Crowther* (1851) 9 Hare 384 (refd)
*Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor* [1989] 3 MLJ 434 (refd)
*Davies v Clough* (1837) 8 Sim 262 (refd)
*Duffy v Hanson* (1867) 16 LT 332 (refd)
*Earl Cholmondeley & Damer v Lord Clinton* (1815) 19 Ves 261 (refd)
*Eastholme Realty Ltd v Grundy* (1954) OWN 583 (refd)
*Essa (Township) v Guergis* (1993) 15 OR (3rd) 573 (refd)
*Greenbaum-Mountain Mortgage Co v Pioneer Nat'l Title Ins Co* 421 F Supp 1348, 1352 (D Colo 1976) (refd)
*Griffiths v Evan* [1953] 2 All ER 1364 (refd)
*Groom v Crocker* [1938] 2 All ER 394 (refd)
*Hart v Frame* (1839) 6 Cl & Fin 193 (refd)
*Heywood v Wellers* [1976] 1 All ER 300 (refd)
*Howe v Robinson* (1890) The Times, 7 July (refd)
*JH Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894 (refd)

*Stephen Chang Holding Sdn Bhd v Goh & Associates* [1989] 3 MLJ 497 (refd)
*Johnson v Marriott* (1833) 4 Tyr 78 (refd)
*Karpenko v Paroian, Courey, Cohen & Houston* (1980) 30 OR (2d) 776 (refd)
*Lanphier v Phipos* (1838) 8 C & P 475 (refd)
*Little v Kingswood Collieries Co* (1882) 47 LT 323 (refd)
*Maxwell v Price* [1960] 2 Lloyd's Rep 155 (refd)
*Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 (refd)
*Miranda v Khoo Yew Boon* [1968] 1 MLJ 161 (refd)
*Moore v Prance* (1851) 9 Hare 299 (refd)
*Nocton v Lord Ashburn* [1914] AC 932 (refd)
*Paine, Re* (1912) 28 TLR 201 (refd)
*Parker v Rolls* (1854) 14 CB 691 (refd)
*Parry v Parry* (1926) 2 WWR 185 (refd)
*People ex rel Younger v Superior Court* 86 Cal App 3d 180, 197, 150 Cal Rptr 156, 166 (1978) (refd)
*Pinley v Bagnall* (1782) 3 Doug KB 155 (refd)
*Pinner v Knights* (1843) 6 Beav 174 (refd)
*PP v Mohtar bin Abdul Latiff* [1980] 2 MLJ 51 (refd)
*PP v Vengadasalam & Ors* [1990] 1 MLJ 507 (refd)
*R v Hayward* (1981) 59 CCC (2d) 134 (refd)
*R v Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] KB D 546 (folld)
*Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch 831 (refd)
*Stanley v Douglas* (1951) 4 DLR 698 (SCC) (refd)
*Townley v Jones* (1860) 8 CBNS 289 (refd)
*United State ex rel Sheldon Elec Co v Blackhawk Heating & Plumbing* 423 F Supp 486 (SDNY 1976) (refd)
*Vijayalakshmi Devi a/p Nadchatiram v Saraswathy Devi a/p Nadchatiram (Beramal Undang-Undangnya di bawah nama dan gaya Tetuan N Saraswathy Devi)* [1996] 2 AMR 2712 (refd)
*Waschuk v Waschuk & Wsachuk* (1955) 14 WWR 169 (refd)
*Wee Choo Keong v Pendakwa Raya* [1990] 2 MLJ 239 (refd)
*Willis v Barron* [1902] AC 271 (refd)

**Legislation referred to**

Legal Profession Act 1976 s 94(3)(n), (o)
Legal Profession (Practice and Etiquette) Rules 1978 rr 3, 4, 5, 27, 28(a), 29
Rules of the High Court 1980 r 13(2)(b)
ABA Code of Professional Responsibility, Disciplinary Rule DR 5–101(B)(1)–(4)5–102(A) [US]
Bar Council of India Governing Advocates r 13 [Ind]
British Columbia Rules Cap 8 r 9 [Can]
California Rules of Professional Conduct r 2–111(A)(4) [US]
Canadian Bar Association's Code of Professional Cap IX, commentary 5 [Can]

Quebec Rules s 3.05.06 [Can]
Solicitors' Practice Rules 1987 r 1 [UK]
Solicitors Act 1974 s 31 [UK]

*Vijayaletchumi Gopal* (*Vijaya Gopal & Associates*) for the plaintiff.
*R Paramanandan* (*Ungku Mohsin bin Ungku Sulaiman* with him) (*Gana Muthusamy & Co*) for the defendant.

**Abdul Malik Ishak J**: The plaintiff sent a motor van JCY 5932 for repairs at the defendant's workshop. There was delay in repairing the motor van. Harsh words exchanged between the parties. The plaintiff wanted to take their motor van from the defendant's workshop but the defendant refused to accede unless the plaintiff settle RM1,267. Mr Gana Muthusamy, an advocate and solicitor, was engaged by the plaintiff and, on the basis of that retainer, he proceeded to the defendant's workshop accompanied by a representative from the plaintiff's company. At the defendant's workshop, Mr Gana Muthusamy spoke to Tan Joo Khing and tried to persuade the latter to release the motor van belonging to the plaintiff with an undertaking by the plaintiff to settle all charges payable to the workshop but without prejudice to the right of the plaintiff to litigate the matter in a court of law. The trip to the defendant's workshop proved futile. On 14 April 1997, Mr Gana Muthusamy then issued a notice to the defendant demanding the release of the motor van within three days failing which the matter would be referred to the court. On 30 April 1997, Tan Joo Khing proceeded to the law firm of Messrs Gana Muthusamy & Co, and there he was served with the writ of summons indorsed with the statement of claim (that must be encl 2), a summons in chambers (that must be encl 6) and two affidavits (that must be encll 5 and 4). Alarmed by the turn of events, Tan Joo Khing met Mr Chua Chong Ying, an advocate and solicitor from the law firm of Messrs Lau Kok Guan & Associates, with specific instructions to contact Mr Gana Muthusamy in order to settle the matter out of court. At the hearing of encl 6 in chambers, Miss Vijayaletchumi Gopal, the learned counsel for the defendant, raised a preliminary objection to the effect that the law firm of Messrs Gana Muthusamy & Co should not appear on record as solicitors for the plaintiff since Mr Gana Muthusamy would be called as a witness by the defendant. Miss Vijayaletchumi Gopal threw the net of her preliminary objection wider when she argued that not only Mr Gana Muthusamy ought not to appear for the plaintiff but the law firm as a whole including the legal assistants of Messrs Gana Muthusamy & Co, should not appear nor act for the plaintiff in the present case — be it in chambers or in open court. As I see it, the preliminary objections can be divided into three parts. The first part would be barring Mr Gana Muthusamy from representing the plaintiff be it in chambers or in open court in the present case as he would be called as a witness by the defendant. The second part would bar the law firm of Messrs Gana Muthusamy & Co, to appear on record as solicitors for the plaintiff in the present case. The third part would bar the legal assistants of the law firm of Messrs Gana Muthusamy & Co, from appearing or acting for the plaintiff be it in chambers or in open court in the present case. The second

A and third parts of the preliminary objections are novel ones and indeed I am breaking new ground and entering into an unchartered area.

As an advocate and solicitor, Mr Gana Muthusamy certainly has an obligation towards his client — the plaintiff. There is a fiduciary relationship between Mr Gana Muthusamy and the plaintiff. In a relationship between
B a solicitor and his client, the former has an obligation to act with strict fairness and openness to the latter. Thus, in the event the solicitor fails to fulfil this obligation, he will be liable to make compensation in respect of any resulting loss to his client though the circumstances are not such as would sustain an action for deceit at common law (*Nocton v Lord Ashburton* [1914] AC 932 (HL) and *Re Burford, Burford v Clifford* [1932] 2 Ch 122
C (CA)). At common law, by that retainer, Mr Gana Muthusamy has an obligation to be skilful and, at the same time, careful particularly when it involves a third party (*Brown v Raphael* [1958] Ch 636 (CA); [1958] 2 All ER 79). If Mr Gana Muthusamy fails to fulfil his obligation, he may be made liable in contract (*Groom v Crocker* [1939] 1 KB 194 (CA); [1938]
D 2 All ER 394) or even for negligence (*Nocton v Lord Ashburton*). These are general principles which apply to all advocates and solicitors and Mr Gana Muthusamy as a careful and prudent advocate and solicitor invited by letter dated 2 June 1997 both the Bar Council and the Bar Committee to send representatives and to air their views before me, but unfortunately none turned up. Be that as it may, a solicitor is under an absolute
E obligation not to disclose confidential information which has come to his knowledge as solicitor for the client (*Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 (CA); *Earl Cholmondeley & Damer v Lord Clinton* (1815) 19 Ves 261; *Bricheno v Thorp* (1821) Jac 300; *Beer v Ward* (1821) Jac 77; *Little v Kingswood Collieries Co* (1882) 47 LT 323 (CA) at p 325 and
F *Johnson v Marriott* (1833) 4 Tyr 78). It is my considered view that as an officer of the court, the solicitor is bound to observe the utmost good faith towards his client. A solicitor must always conduct himself with decorum and avoid a conflict of interest situation. Thus, if a solicitor represents both the trustees and an infant and the question of compromising the infant's claim arises, the solicitor should immediately arrange for the
G infant to be separately represented (per Kay J in *Howe v Robinson* (1890) The Times, 7 July). The client always has a fixed notion about his solicitor. This is unavoidable. The solicitor normally holds himself out to his client as a person possessing adequate skill, knowledge and learning to handle both contentious and non-contentious matter (*Hart v Frame* (1839)
H 6 Cl & Fin 193 (HL); *Lanphier v Phipos* (1838) 8 C & P 475 and *Parker v Rolls* (1854) 14 CB 691). It is for this reason that a solicitor may be guilty of negligence if he causes loss or damage to his client for want of such knowledge he ought to possess or for want of such care he ought to exercise (*Maxwell v Price* [1960] 2 Lloyd's Rep 155). An action for damages will normally follow as a result of that negligence (*Townley v Jones* (1860)
I 8 CBNS 289 is a classic example where a solicitor was ordered to pay, out of his own pocket, the costs of the day thrown away for having failed to instruct counsel in time). Now, when the plaintiff sought the help of Mr Gana Muthusamy, they must have known that the latter, as an advocate

and solicitor, had adequate skill, knowledge and learning to handle the problem. The relationship of a solicitor and client has thus developed and it blossomed into full bloom when Mr Gana Muthusamy initiated the writ of summons with the indorsed statement of claim. The summon in chambers together with the affidavits were also filed by Mr Gana Muthusamy.

The crucial question to ask is this: would Mr Gana Muthusamy jeopardize his client's interests by continuing to act for his client when it has become apparent that he will be called as a witness by the opposing party? Rule 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 states that an advocate and solicitor shall not appear in court or in chambers in any case in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact, and if while appearing in a case it becomes apparent that he will be such a witness, he shall not continue to appear if he can retire without jeopardizing his client's interests. To be fair to Mr Gana Muthusamy at no point of time has he appeared before me in regard to the present case — be it in chambers or in open court and he must have known of the impending first part of the preliminary objection as it was adverted to by the defendant in their affidavit at para 16 thereof that was affirmed on 10 May 1997 as reflected in encl 12. In fact, on the first occasion when encl 6 came up for hearing Mr R Paramanandan, a legal assistant from the law firm of Messrs Gana Muthusamy & Co, appeared for the plaintiff. Later, on two other occasions, the same legal assistant from the same law firm and assisted by Mr Ungku Mohsin bin Ungku Sulaiman, a chambering student, appeared for the plaintiff. Mr Gana Muthusamy distanced himself from attending court from the very beginning even though his law firm was retained by the plaintiff at a fee of RM10,000 — an averment in encl 12 which was not disputed by Mr R Paramanandan initially but on an adjourned hearing he informed the court that Messrs Gana Muthusamy & Co was only paid, thus far, a sum of RM4,500. There is no requirement in the law that a retainer must comply with certain prescribed formalities. It need not be in writing and may be oral in nature. It may be inferred by the acts done by the solicitor and acquiesced by the client (*Pinley v Bagnall* (1782) 3 Doug KB 155). To illustrate further, two vintage Malaysian cases must be referred to. In *Miranda v Khoo Yew Boon* [1968] 1 MLJ 161, Azmi CJ (Malaya) had this to say of a solicitor client relationship especially in regard to a retainer (at p 163):

> As I understood him, Mr Devadason's contention under para (a) was that there was no relationship of solicitor and client between the appellant and respondent at the time the memorandum of appeal was to be filed, because the respondent had failed to pay the next instalment of fees as previously agreed to between them and secondly, the respondent was not available for the purpose of signing the memorandum of appeal.
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> In reference to this point, surely, having indicated to the court, in signing notice of appeal and filing it, that he was a solicitor to the respondent, the appellant could not say that he was no longer so, without previously getting the leave of the court.

*Miranda*'s case establishes the principle that a solicitor who filed a notice of appeal on behalf of his client could not deny that there was a retainer

A and the failure of the client to pay a due instalment by way of fees was immaterial to the existence of the retainer.

In *Dato' Seri Au Ba Chi v Malayan United Finance Bhd & Anor* [1989] 3 MLJ 434, the High Court ruled that the mere fact of a previous course of dealings was instrumental in helping to establish a present B retainer. Mohamed Yusoff J (who later rose as SCJ) in delivering the judgment of the court cited with approval the passage from the decision of Scott LJ in *Groom v Crocker* [1938] 2 All ER 394 especially at p 413 and I can do no better than to re-produce that passage hereinunder.

That passage explains the relationship of a solicitor and client in C these words:

> The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the D client's interest, and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria. In all these aspects, however, the tie between the two E is contractual.

The affidavit of Mr Gana Muthusamy in encl 5 that was affirmed on 24 April 1997 and filed on the same date in support of encl 6 spoke of a solicitor-client relationship in para 1 thereto. It was worded thus:

> F Saya adalah peguamcara yang mengendalikan perkara ini dan segala fakta-fakta yang dideposkan di sini adalah benar dan berdasarkan pengetahuan peribadi saya kecuali jika dinyatakan sebaliknya.

At para 5 of the same affidavit, Mr Gana Muthusamy deposed of the fact that he had served a notice dated 14 April 1997 to the defendant wherein the latter was given three days to return the plaintiff's motor van with an G undertaking by the plaintiff to pay the charges incurred but the defendant refused to respond. That paragraph was worded thus:

> Saya kemudiannya telah menghantar satu notis tuntutan bertarikh 14 April 1997 kepada defendan memberikan defendan masa tiga hari untuk memulangkan balik kenderaan plaintif dengan akujanji plaintif untuk H membayar upah yang perlu dibayar sehingga ke tarikh tersebut, tetapi defendan gagal, enggan/ingkar berbuat demikian. Sesalinan notis tersebut adalah dilampirkan dan ditandakan sebagai eks 'G1'.

In fact, the whole of encl 5 established to the hilt the retainer. It is said that the act of authorizing or employing a solicitor to act for a client constitutes the solicitor's retainer by that client. *Adams v London Improved Motor* I *Coach Builders Ltd* [1921] 1 KB 495 (CA) and *Bolden v Nicholay* (1857) 3 Jur NS 884 established the principle that where a solicitor acts for a client with the client's authority, the presumption is that the client is liable for the solicitor's costs. Put in another way, by the giving and acceptance

of the retainer, the solicitor automatically acquires his authority to act for the client and the client would be bound by it. It is always on the solicitor's part to prove the existence of a retainer (*Pinner v Knights* (1843) 6 Beav 174; *Re Paine* (1912) 28 TLR 201; and *Griffiths v Evans* [1953] 2 All ER 1364) and if the solicitor fails to discharge that burden of proof, he may be liable for costs incurred therein (*Crossley v Crowther* (1851) 9 Hare 384; and *Moore v Prance* (1851) 9 Hare 299). In the present case before me, Mr Gana Muthusamy had been paid RM10,000 by the plaintiff to conduct the case expeditiously notwithstanding the fact that Mr R Paramanandan informed the court without supportive affidavit evidence that it was RM4,500 only. It was a retainer to sue for damages as can be seen from the statement of claim. That being the case, the retainer can be said to be an entire contract: *Heywood v Wellers (a firm)* [1976] 1 All ER 300; *JH Milner & Son v Percy Bilton Ltd* [1966] 2 All ER 894 and *Stephen Chang Holding Sdn Bhd v Goh & Associates* [1989] 3 MLJ 497.

Mr Gana Muthusamy knew that he was required as a witness by the defendant. How could he perform in court or in chambers for the plaintiff without running counter to r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978? He must be in a dilemma as confidential information had been relayed to him by his client — the plaintiff. What should he do? Kang Hwee Gee J in *Abdul Halim bin Abdul Hanan & Ors v Pengarah Penjara, Taiping & Ors* [1996] 4 MLJ 54 had this to say on the question of ethics (at pp 60–61):

> But quite apart from the question of counsel's competency to swear the affidavit, his direct involvement in his clients' case seems to have touched on the delicate question of professional ethics. Rule 28 of the Legal Profession (Practice and Etiquette) Rules 1978 provides that a solicitor should not appear in a matter in which he has reason to believe that he will be a witness. It would, therefore, appear to be against ethics for counsel to swear an affidavit on a substantive allegation for his clients in this case and later appear to plead his case in this court (see *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315).

In the next two paragraphs, his Lordship continued:

> Having sworn the affidavit in support of his clients' summons, in order not to run foul of r 28, counsel should not have appeared in court and should have left the conduct of this case to another counsel.

Mahadev Shankar J (now JCA) in *Million Group Credit Sdn Bhd v Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 said at p 317 of the judgment:

> A second point which needs to be emphasized is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence. The rules relating to conduct and etiquette in the profession quite clearly say that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of a material and disputed question of fact (see r 28 of the Legal Profession (Practice and Etiquette) Rules 1978).

*Vijayalakshmi Devi a/p Nadchatiram v Saraswathy Devi a/p Nadchatiram (Beramal undang-undangnya di bawah nama dan gaya Tetuan N Saraswathy Devi)* [1996] 2 AMR 2712 is an interesting case. It involved the solicitor having blood relations with the litigants she was representing. Mohd Noor Abdullah J delivering the judgment of the court observed succinctly at p 2721 of the report:

> Here the blood relationship between the defendant and the litigants is so closely connected that the defendant's duty to the court becomes subordinate to her obligation to her client or is otherwise marred by her personal feeling for one party against the other thereby putting her personal interest over her head and her duty to court under her feet. The court must not allow it.

It is pertinent to note that his Lordship Mohd Noor Abdullah J in the same case had to decide on the question of barring Saraswathy Devi d/o Nadchatiram, who practised under the name and style of Messrs N Saraswathy Devi, and her legal assistants from acting as advocates and solicitors for certain named individuals. After reviewing the law, his Lordship concluded in the following words:

> Tuan Hj Sulaiman bin Abdullah who appeared for the Bar Council states that the Bar Council is impartial in the dispute between the parties. However, noting that the defendant is closely related to the parties in all the cases and noting further that the defendant has a pecuniary interest in the matters under litigation, the Bar Council is of the view that the defendant should not only be disqualified from acting or continuing to act for her relatives but should have withdrawn herself from so acting at a very early stage and not subjected herself to this embarrassment, to which I would add a humiliation for an advocate and solicitor of 36 years standing. With that remark, I allow the plaintiff's application as prayed with costs.

With the greatest of respect, his Lordship Mohd Noor Abdullah J did not decide as to whether the law firm of Messrs N Saraswathy Devi and her legal assistants were barred from acting as advocates and solicitors for those named individuals. It would appear therefore that the second and third parts of the preliminary objections advanced in the present case must be answered without the benefit of *Vijayalakshmi Devi a/p Nadchatiram*'s case.

The headnote to the case of *PP v Vengadasalam & Ors* [1990] 1 MLJ 507, a decision of Lim Beng Choon J, bears an interesting passage. It is this:

> It is undesirable for an advocate to appear as a counsel in a trial when he is required to be a material witness. If an advocate, knowing that he is going to be a material witness, insists on appearing as counsel in the case, the presiding court has the jurisdiction to take the appropriate action in the interest of justice to ensure the fair and orderly conduct of the trial. In the present case, the magistrate, therefore, had the jurisdiction to make an order restraining Mr Annamalai from acting for the accused persons.

Lim Beng Choon J, after reviewing certain Indian authorities, had this to say at p 512 of the report:

> Although I have lifted the injunctive order restraining Mr SP Annamalai from defending the three accused persons, nevertheless, perhaps learned counsel would like to reconsider whether it would be wise for him to continue to defend his clients. Should it turn out that, in the midst of testifying, his evidence is quite material, he would have to retire and his clients would be left in the lurch, and what is worse is that he may find himself open to a charge of misconduct.

Wan Yahya J (who later rose as FCJ) watered down the rigours of r 28 of the Legal Profession (Practice and Etiquette) Rules 1978 in *Wee Choo Keong v Pendakwa Raya* [1990] 2 MLJ 239. This was what his Lordship said:

> This section to my mind does not envisage that an advocate and solicitor is ipso facto excluded from appearing as such in court the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.

It is appropriate to set out briefly the facts in *Wee Choo Keong*'s case. In that case, the petitioner as counsel was retained by the family of a deceased detainee to hold a watching brief at the inquest. At the inquest, the prosecuting officer objected to the petitioner's presence in court as counsel on a watching brief as his statement had been recorded and he would be called as a witness. The learned magistrate upheld the objection in accordance with r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978. On revision, his Lordship Wan Yahya J varied the learned magistrate's order and observed:

> In a case like this, the rule of common sense and fair play in keeping with our tradition of maintaining a fair and impartial adversarial system should be observed.
>
> The only matter which appears to be in conflict with the petitioner's presence is the allegation that he and not the witness wrote the report. The problem could be fairly solved by confining the order of the learned magistrate on the exclusion of counsel only to that stage of the proceeding if and when the deceased's son is about to give evidence and it is hereby so ordered.

It is unfortunate that his Lordship Wan Yahya J did not address the issue of the petitioner himself who would be put in the witness box as a prosecution witness. As a prosecution witness, the petitioner can never be said to act without jeopardizing his client's interests.

At this juncture, by way of comparison, reference may be made to the Bar Council of India Governing Advocates particularly r 13 thereof which states:

> An advocate should not accept a brief or appear in a case in which he has reason to believe that he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he should not continue to appear as an advocate if he can retire without jeopardizing his client's interests.

A It is clear that our r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 lays emphasis on the words 'a material and disputed question of fact' whereas the Indian version talks of 'a material question of fact.' The Indian version too is quite stringent as at the outset it prevents an advocate from accepting a brief under circumstances mentioned therein. Our rule 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 B do not bar an advocate and solicitor from accepting a brief subject to the circumstances mentioned therein.

What would happen if Mr Gana Muthusamy is called upon to give evidence in the witness box? Surely he would be embarrassed as he could not cross-examine himself, nor can he address the court as to the credibility C of his own testimony. As counsel for the plaintiff, Mr Gana Muthusamy would be seriously handicapped in representing his client's interests. That would not be fair to his client. In that situation, this court feels that justice will not be done if Mr Gana Muthusamy represents the plaintiff. As I said earlier, the relationship of a solicitor and his client is confidential in nature. D The client trusts his solicitor confidentially and personally entrusts his solicitor to do certain things. It follows that what is entrusted to the solicitor must be done by that solicitor and may not be delegated (*Duffy v Hanson* (1867) 16 LT 332). Mr Gana Muthusamy is the sole proprietor of his own law firm known as Messrs Gana Muthusamy & Co. No one can dispute the fact that that law firm belongs to him. Looking at the letter E head of the law firm, it carries the names of two individuals both qualified in law and they can be described as the legal assistants to Mr Gana Muthusamy. In fact, Mr R Paramanandan described himself as a legal assistant. A retainer by the plaintiff of Mr Gana Muthusamy must necessarily mean a retainer of Messrs Gana Muthusamy & Co as solicitors for the F plaintiff. The two cannot be separated. They are one and the same. They are indivisible. As an example, when Mr Gana Muthusamy filed the writ of summons indorsed with the statement of claim together with the summons in chambers in encl 6 and the affidavits attached thereto, he signed onto a letter head bearing the name of the law firm Messrs Gana Muthusamy & Co, as can be seen in encl 1. In short, Mr Gana Muthusamy G practised law under the name and style of Messrs Gana Muthusamy & Co. Thus, whatever confidential information that was relayed by the plaintiff to Mr Gana Muthusamy must be kept by him and it necessarily follow that it would also be kept by the law firm of Messrs Gana Muthusamy & Co. For the hearing of encl 6, Mr R Paramanandan signed the 'perakuan H segera' in encl 3 to show to this court that he and not Mr Gana Muthusamy had conduct of this case. As a legal assistant, Mr R Paramanandan is an employee of Mr Gana Muthusamy. Mr R Paramanandan is appropriately described as an advocate and solicitor with the law firm of Messrs Gana Muthusamy & Co. As a legal assistant, Mr R Paramanandan will always be at the beck and call of Mr Gana Muthusamy. Mr R Paramanandan would I be obliged to report to Mr Gana Muthusamy the progress of this case from time to time. This is inevitable. So long as Mr R Paramanandan continues to handle this case, the plaintiff would seek advice from Mr Gana Muthusamy by visiting the latter either in his home or at the law firm of

Messrs Gana Muthusamy & Co. This too is inevitable. Mr Gana Muthusamy too would have to consult the plaintiff in certain circumstances, after all the plaintiff is his client. As Scott LJ said in *Groom v Crocker* [1938] 2 All ER 394 especially at p 413F:

> ... the solicitor should consult with his client in all questions of doubt which do not fall within the express or implied discretion left him, and should keep the client informed to such an extent as may be reasonably necessary according to the same criteria.

My fear is this. There may come a time when Mr Gana Muthusamy may be placed by circumstances in a position where he fails in his duty if he does not advise his client to take independent advice (*Willis v Barron* [1902] AC 271 (HL) at p 284). One must not forget that Mr Gana Muthusamy and Mr R Paramanandan, like other practising advocates and solicitors, are bound by the Legal Profession Act 1976 and the Legal Profession (Practice and Etiquette) Rules 1978. Put in another way, an advocate and solicitor is under a professional obligation to observe the standard of conduct required of members of his profession and to conform to the disciplinary rules as set out under the Legal Profession (Practice and Etiquette) Rules 1978. A failure to observe the rules will subject the advocate and solicitor to the possibility of punitive action at the instance of the client. For this exercise, rr 3, 4, 5, 27 and 29 of the Legal Profession (Practice and Etiquette) Rules 1978 must be referred to and they are quite self explanatory:

> 3 (a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.
>
> (b) An embarrassment arises —
>
> (ii) where there is some personal relationship between him and a party or a witness in the proceedings.
>
> 4 No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.
>
> 5 (a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.
>
> 27 (a) An advocate and solicitor shall not appear in any matter in which he is directly pecuniarily interested.
>
> (b) This rule does not apply to the case of an advocate and solicitor appearing himself to tax his own costs.
>
> 29 Except when essential to the ends of justice or as to merely formal matters, an advocate and solicitor appearing in any cause shall not testify in Court on behalf of his client only in that cause.

In *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33, it was held that the only effect of a breach of these rules was in relation to discipline. In that case, there was a failure to serve the appropriate notice on solicitors on the record when entering a judgment by default, which was a breach of r 56. Zakaria Yatim J (now FCJ) refused

to hold that the failure to comply with r 56 made the default judgment an irregular one. This was what his Lordship said (at p 34):

> In my opinion, the Practice and Etiquette Rules 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The rules do not regulate the procedure of legal proceedings in the High Court. Indeed, the Bar Council has no power under the Legal Profession Act 1976 to make rules to regulate procedure of legal proceedings.

Stern warnings have been issued by the Malaysian courts in regard to non-compliance with the Legal Profession (Practice and Etiquette) Rules 1978. Salleh Abas LP had occasion to say in *Cheak Yoke Thong v PP* [1984] 2 MLJ 119 at p 123 to the following effect:

> We think lawyers should refrain themselves from briefing the press on matters pending before the court, especially when they have not been properly before it. We would like to remind them of the rr 45, 46 and 47 of the Legal Profession (Practice and Etiquette) Rules 1978, which seem to us to be relevant in the circumstances of this case. We hope that the rules are not dead letters.

Harun Hashim J (who retired as SCJ) in *PP v Mohtar bin Abdul Latiff* [1980] 2 MLJ 51 and Mahadev Shankar J (now JCA) in *Abdul Kadir bin Abdul Rahman v PP* [1984] 1 MLJ 80 aired their learned views in regard to the Legal Profession (Practice and Etiquette) Rules 1978. References to these cases would be of great help. Be that as it may, this judgment is not meant to cast aspersions on Mr Gana Muthusamy and Mr R Paramanandan. By not appearing in chambers in regard to encl 6 has put Mr Gana Muthusamy above board — an impeccable conduct befitting an advocate and solicitor.

In breaking new ground, this judgment would be incomplete without referring to decisions from other jurisdictions. In a renowned American case of *Comden v Superior Court*, 20 Cal 3d 906, 912, 576 P 2D 971, 973, 145 Cal Rptr 9, 11, cert denied, 439 US 981 (1978) an argument was advanced at the preliminary injunction hearing to disqualify the law firm retained by the petitioners. The trial court held that representation by the law firm would violate r 2–111(A)(4) of the California Rules of Professional Conduct because the two attorneys who made the declarations might be called to testify at the trial. The testimony in question pertained to statements heard by one of the attorneys which, if true, would establish breach of contract by the distributing company. At the meeting, the distributing company allegedly admitted that it had transferred an equity interest in the company, a transfer expressly prohibited by the contract. There were others present at that meeting who heard the same information. In a 4–3 decision, the Supreme Court of California held that the trial court's disqualification of the law firm because a member of that firm ought to be called as a witness for the petitioners was not an abuse of discretion. Rule 2–111(A)(4) of the California Rules of Professional Conduct ('the California rule') is an interesting rule. It is worded as follows:

If upon or after undertaking employment, a member of the State Bar knows or should know that he or a lawyer in his firm ought to be called as a witness on behalf of his client in litigation concerning the subject matter of such employment he shall withdraw from the conduct of the trial and his firm (if any, shall not continue representation in the trial, except that he) may continue the representation and he or a lawyer in his firm may testify in the following circumstances:

(a) If the testimony will relate solely to an uncontested matter; or

(b) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(c) If the testimony will relate solely to the nature and the value of legal services rendered in the case by the lawyer or his firm to the client; or

(d) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

In a nutshell, r 2–111(A)(4) of the California rule governs an attorney's withdrawal from employment. It requires an attorney and his firm to withdraw from representing a client in two distinct situations. Firstly, when the attorney himself must testify for the client. Secondly, when a member of his firm must testify. It is interesting to note that r 2–111(A)(4) of the California rule is substantially similar to r 5–102(A) of the ABA Code of Professional Responsibility, Disciplinary Rule ('ABA code'). The pertinent part of the ABA code states:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5–101(B)(1) through (4).

The exceptions enumerated in DR 5–101(B)(1) through (4) are:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

It is germane to mention that the ABA code is not binding on an American attorney, rather it is intended to serve as a model for individual state legislatures or judiciaries to use in drafting their own state ethical codes. State ethical codes, like the California rule, are binding on attorneys in the Californian state and consequently the disciplinary rules of those codes must be obeyed by members of the bar: *Comden v Superior Court.* In

America, proponents of the advocate-witness rule argue that it is susceptible to impeachment and is weakened in its evidentiary effect because witnesses have financial and professional interests in the outcome of the trial (*United States ex rel Sheldon Elec Co v Blackhawk Heating & Plumbing* 423 F Supp 486, 489 (SDNY 1976); and *People ex rel Younger v Superior Court* 86 Cal App 3d 180, 197, 150 Cal Rptr 156, 166 (1978)). In the American context, from the long lines of authorities, although the reasons for disqualifying the trial counsel when he ought to testify are clear, yet the reasons for disqualifying the trial counsel's firm when a member ought to testify are not well defined. The Supreme Court of California in the case of *Comden v Superior Court* held that even if the testimony is from an attorney-witness who is not himself the party's counsel, but merely a member of the same firm, the law firm must be disqualified. The upshot of the decision in *Comden v Superior Court* gave rise to litigation tactic where law firms are spending millions of American dollars bringing disqualification motions against other firms and defending such motions brought against them (*United States ex rel Sheldon Elec Co v Blackhawk Heating & Plumbing* and *Greenbaum-Mountain Mortgage Co v Pioneer Nat'l Title Ins Co* 421 F Supp 1348, 1352 (D Colo 1976)). Justice Manuel who gave a dissenting judgment in *Comden v Superior Court*, with whom Justices Bird and Tobriner joined in dissent, criticized the majority for applying the California rule mechanically and held the view that the client's right to choose his counsel should not be sacrificed merely to avoid the appearance of impropriety. Justice Manuel took pains to note that although the testimony of the attorney may reduce his effectiveness on behalf of his client, yet the choice of counsel must be made by the client, and 'neither his opponent nor the trial court should be able to assert his choice against the party without clear evidence of detriment to the opponent or injury to the integrity of the judicial process'. So much for the American system.

I will now proceed to Canada. It has a fused profession just like Malaysia. Canada too is part of the Commonwealth. Quite a number of cases have been decided on the issue of 'lawyers who became witnesses' in the Canadian courts. Thus, cases like *Eastholme Realty Ltd v Grundy* (1954) OWN 583 (CA); *Parry v Parry* (1926) 2 WWR 185; *Cairns v Cairns* (1931) 3 WWR 335 at p 345 (Alta CA); *Waschuk v Waschuk & Waschuk* (1955) 14 WWR 169 (Sask, CA); *Stanley v Douglas* (1951) 4 DLR 698 (SCC); and *R v Hayward* (1981) 59 CCC (2d) 134 (Nfld CA) laid down these basic principles: that a lawyer should not act as counsel and be a witness in the same proceeding. That in a proceeding in which a lawyer is acting as counsel, the lawyer should neither submit the lawyer's own affidavit nor testify, except as permitted by the rules of civil procedure, or purely in relation to formal or uncontroverted matters.

In a case where a lawyer is required to testify, that lawyer should withdraw and entrust the conduct of the case to another lawyer. It has been said that a lawyer who has given evidence should not appear as counsel on appeal. A lawyer should not simultaneously serve as counsel and witness. To do so would put the lawyer's own credibility at stake and an issue. These are generally Canadian principles that grew up over the

years. In *Essa (Township) v Guergis* (1993) 15 OR (3rd) 573 (Div Ct), the Ontario Divisional Court held the view that it is not the case that when a lawyer is expected to testify in a lawsuit, the lawyer's firm must always be prevented from acting as counsel. That was a flexible approach. A

The Canadian Bar Association's Code of Professional Conduct provides that a lawyer's partners and associates should not testify in proceedings except as to merely formal matters (CBA Code, chapter IX, commentary 5; see also Quebec rules, s 3.05.06; and British Columbia rules, Cap 8 r 9). Anderson J in *Karpenko v Paroian, Courey, Cohen & Houston* (1980) 30 OR (2d) 776 at p 783 held the view that a lawyer who was called to give expert evidence in a solicitor's negligence action has a duty to be as familiar with the case as was the lawyer whose act or omission was in question. B C

A book entitled *Professional Ethics And Responsibilities of Lawyers* written by ARB Amerasinghe gave an insight into the legal position in Sri Lanka, another Commonwealth country. The writer wrote at p 377: D

> Although a party may call his attorney as a witness and although a court may permit the examination of an attorney at any stage in the case on any relevant matter, ordinarily an attorney should decline to act as counsel in a matter in which he has reason to believe he or a member of his firm is likely to be a witness on a material question of fact, except as to merely formal and non-contentious matters such as the identification, attestation or custody of a document and the like. Testimony may be given with regard to the nature and value of legal services rendered in the case, for that is an issue of which the judge is likely to have first hand knowledge and dependence on the adversary process to test the credibility of testimony is limited. E
>
> An attorney who has been a witness in the court below should not, except with the leave of the appellate court, accept a brief in that matter in an appellate court. F
>
> Whenever possible, an attorney should avoid the situation where the answer of a witness could be refuted only by the evidence of the attorney.
>
> However, if counsel does testify on behalf of his client, no legal error (as distinguished from a violation of a rule of conduct) is committed justifying a new trial. G

At p 378, the learned author continued:

> There are no restrictions upon an attorney's right to cross-examine another lawyer, and a lawyer who does appear as a witness should not expect to receive special treatment by reason of his professional status. The fact that he has no special status is emphasized by the fact that he must not appear in his robes in the witness box. H
>
> In deciding whether to act as a witness, an attorney should be mindful of the fact that he may handicap a colleague at the Bar in challenging his credibility or putting himself in the unseemly position of arguing his own credibility and also that he may place the court in the awkward position of deciding whether he is as an attorney arguing the case of his client objectively as an officer of court or, as a witness who is likely to be prejudiced. I

In England, the Solicitors' Practice Rules 1987 (dated 20 January 1987) made by the Council of The Law Society with the concurrence of the

Master of the Rolls under s 31 of the Solicitors Act 1974 should be a source of inspiration. Rule 1 of the Solicitors' Practice Rules 1987 states as follows:

> A solicitor shall not directly or indirectly obtain or attempt to obtain instructions for professional work or permit another person to do so on his behalf, or do anything in the course of practising as a solicitor, in any manner which compromises or impairs or is likely to compromise or impair any of the following:
>
> (a) the solicitor's independence or integrity;
>
> (b) the client's freedom to instruct a solicitor of the client's choice;
>
> (c) the solicitor's duty to act in the best interests of the client;
>
> (d) the good repute of the solicitor or of the solicitors' profession;
>
> (e) the solicitor's proper standard of work.

*Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 laid down an old principle which is worth repeating. It says that each case turns on its own facts and that while the court may require from solicitors a higher standard of conduct than from persons who are not its officers, yet the principle upon which it restrains a solicitor from acting against a former client is the prevention of abuse of the confidence reposed in the solicitor by his former client. Rule 1 of the Solicitors' Practice Rules 1987 covers a wide ground on a wide range. The wide ambit means that a solicitor is not permitted to act towards any person in a way which is fraudulent, deceitful or otherwise contrary to his position as a solicitor. The solicitor too may not use his position as a solicitor to take an unfair advantage of a third party for his own benefit or for that matter for the benefit of any other person. In *Davies v Clough* (1837) 8 Sim 262 quite apart from the fact that the firm was not allowed to act, the Vice Chancellor at p 268 was of the view that if one partner could not act, neither could the other.

In Malaysia, we do not have the equivalent of the California rule nor the ABA code. As demonstrated, the Supreme Court of California by a majority mechanically applied the California rule and gave effect to it vigorously notwithstanding the dissenting views of the minority. Am I supposed to apply the Legal Profession (Practice and Etiquette) Rules 1978 mechanically to the facts of the present case? One thing is certain. The American and the Canadian systems protected the clients' interests. It boils down to this. Lawyers should not act as counsels and witnesses in the same proceedings. The same position would also be true for Sri Lanka and England.

Reverting back to the issue at hand, Mr R Paramanandan argued that the delay in disposing of the present case would be crucial. This was indeed true. The plaintiff basically claimed for loss of usage of the motor van while the defendant claimed for storage charges and costs of labour and materials in the counterclaim. Any further delay in disposing the case would not be good to all parties. It has the effect of increasing the quantum of damages. Put bluntly, it means that the damages incurred would be monumental. At the adjourned hearing, Mr R Paramanandan informed

the court that his client was interested in settling the matter on the following terms: A

(1) The plaintiff was willing to pay all the repair bills owed by the plaintiff to the defendant so as to enable the plaintiff's motor van kept by the defendant to be returned to the plaintiff.

(2) That the issues of damages sustained by both parties to be determined at the trial. B

(3) That the costs of the application in encl 6 be costs in the cause. This meant that the victor and not the vanquish would be entitled to the costs at the trial.

(4) That the law firm of Messrs Gana Muthusamy & Co, have decided to discharge themselves when the matter came up for trial bearing in mind that Mr Gana Muthusamy would be called as a witness for the defendant. Nevertheless, the law firm of Messrs Gana Muthusamy & Co, would continue to be on record for the hearing of encl 6 unless this court was minded to uphold the defendant's preliminary objections. C D

Miss Vijayaletchumi Gopal, the learned counsel for the defendant, merely agreed to proposals (1) and (4). She disagreed to proposals (2) and (3). I took note of these proposals and the responses thereto and proceeded to hear further submissions on the preliminary objections. E

Section 94(3)(n) and (o) of the Legal Profession Act 1976 merits reproduction. It reads as follows:

> 94 (3) For the purposes of this Part, 'misconduct' means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes — F
>
> (n) gross disregard of his client's interests; and
>
> (o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

G

To allow Mr Gana Muthusamy or his legal assistants to appear in chambers or in open court when the former would be a witness in the case would simply mean flying in the face of the clear words in s 94(3)(n) and (o) of the Legal Profession Act 1976. As advocates and solicitors, they should have due regard to their client's interests and must conduct themselves with decorum so as not to bring the legal profession into disrepute. The law firm of Messrs Gana Muthusamy & Co, would equally be infected and should not remain on record as solicitors for the plaintiff for the simple reason that Mr Gana Muthusamy owns that law firm. H

Two affidavits that were filed, quite late in the day, as reflected in encll 19 and 20, were not considered by this court as it ran counter to O 32 r 13(2)(b) of the RHC. It was the intention of Mr R Paramanandan to rely on these affidavits merely to show that Messrs Gana Muthusamy & Co was paid, to date, RM4,500 and not RM10,000. I

Miss Vijayaletchumi Gopal, the learned counsel for the defendant, argued that Mr Gana Muthusamy would be a witness for the defendant 'in respect of a material and disputed question of fact'. She took pains in setting out the possible lines of questioning that would be posed to Mr Gana Muthusamy. Four lines of questionings were advanced and these may be compendiously framed in the following words:

(1) Whether the plaintiff had offered to pay labour charges and the costs of spare parts which amounted to RM1,267?

(2) Did the defendant refuse to return the motor van after these offers were made?

(3) Did the defendant meet Mr Chua Chong Ying with a view to settle the dispute?

(4) Did Mr Chua Chong Ying contact Mr Gana Muthusamy for a possible settlement?

In my judgment, when Mr Gana Muthusamy visited the defendant's workshop and spoke to Tan Joo Khing, he became a witness on these material and disputed questions of facts. By virtue of r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978, Mr Gana Muthusamy should be barred from representing the plaintiff be it in open court or in chambers. There are no concessions to be offered. The rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this august profession. The courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. Faced with this sanction, it would be a gross misconduct on the part of that particular advocate and solicitor to so appear. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute. It is the court that will determine that right. There is a passage appearing in the judgment of Humphreys J in *R v Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] KB D 546 that merits reproduction. It is this:

> There is a short observation which the other members of the court desire me to make and with which I agree. It has been brought to the attention of the court that, on the hearing at Bow Street, junior counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as counsel in the case. No objection was taken to this by counsel on the other side. We think it right to point out that this was irregular and contrary to practice. A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as both counsel and witness in the same case.

Applying that passage to the present case, as a fused profession, Mr Gana Muthusamy cannot be a witness for the defendant and counsel for the plaintiff. That would be wrong and contrary to r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

Must Mr R Paramanandan and all the legal assistants of Messrs Gana Muthusamy & Co be barred from acting and appearing for the

plaintiff in the present case, be it in chambers or in open court? Now, if Mr R Paramanandan were permitted to represent the plaintiff, be it in chambers or in open court, Mr Gana Muthusamy would find himself breaching that concept of absolute obligation not to disclose confidential information which has come to his knowledge as counsel for the plaintiff because that confidential information will be relayed to Mr R Paramanandan. As an employee and a legal assistant to Mr Gana Muthusamy, Mr R Paramanandan would be obliged to report to Mr Gana Muthusamy the daily progress of the case. Having been briefed of the daily progress of the case, Mr Gana Muthusamy by virtue of his retainer must then advise the plaintiff. The position would also be the same if other legal assistants from the law firm of Messrs Gana Muthusamy & Co were allowed to represent the plaintiff in the present case be it in chambers or in open court. It is a vicious circle. To say that Mr Gana Muthusamy would not be involved in the case at all is wrong. No doubt Mr Gana Muthusamy would not appear in chambers and in open court for this case but indirectly he would be involved. How could Mr Gana Muthusamy conduct himself with decorum and avoid a conflict of interest situation if Mr R Paramanandan is allowed to represent the plaintiff in the present case, be it in chambers or in open court? For fear of repetition, since Mr Gana Muthusamy owns the law firm of Messrs Gana Muthusamy & Co, that law firm should not appear on record as solicitors for the plaintiff. I am constrained to mechanically apply not only the Legal Profession Act 1976 but also the Legal Profession (Practice and Etiquette) Rules 1978 to the facts of the present case.

For the reasons adumbrated above, I made the following orders:

(1) Mr Gana Muthusamy would be barred from representing the plaintiff in chambers or in open court in the present case.

(2) The law firm of Messrs Gana Muthusamy would not appear on record as the solicitors for the plaintiff in the present case.

(3) Mr R Paramanandan and all other legal assistants of Messrs Gana Muthusamy & Co, would be barred from appearing or acting for the plaintiff in the present case — be it in chambers or in open court.

It is now open to the plaintiff to seek out another advocate and solicitor from another law firm to take over the case and pursue the matter further. There be no order as to costs.

*Preliminary objection allowed.*

Reported by Akbardin bin Abdul Kader